Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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SEP 4 '96

In the Matter of	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket 96-98

OPPOSITION OF SPRINT SPECTRUM L.P. TO MOTION FOR STAY PENDING JUDICIAL REVIEW

The joint motion for stay pending judicial review (the "Motion") filed by GTE Corporation and the Southern New England Telephone Company ("GTE/SNET") is no more than a desperate attempt to forestall local telecommunications competition. Having lost in their attempts to dissuade first Congress and, in turn, the Commission from actively and properly implementing a marketplace approach that will encourage competition, GTE/SNET now seek to enlist the courts in their efforts to prevent consumers in their markets from having the benefits of competitive new services. Sprint Spectrum L.P. ("Sprint Spectrum") urges the Commission to deny the Motion.[1/]

A stay pending appeal is an extreme equitable remedy that should be granted only in clear cases of irreparable harm. The Motion does not present such a case. It fails to demonstrate, as it must, that (1) GTE/SNET would be irreparably harmed by denial of a stay while other parties would not be harmed by its grant; (2) the public interest favors a

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[1/] Sprint Spectrum is a joint venture formed by subsidiaries of Sprint Corporation, Tele-Communications, Inc., Comcast Corporation and Cox Communications, Inc. Sprint Spectrum holds personal communications service ("PCS") licenses or affiliations entitling it to service some 180 million Americans and is in the process of preparing to launch its services.

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stay; and (3) GTE/SNET are likely to succeed. *See Washington Metropolitan Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

I.

GTE/SNET WOULD NOT BE IRREPARABLY HARMED BY DENIAL OF THE REQUESTED STAY, BUT NEW ENTRANTS *WOULD* BE HARMED ITS GRANT.

The Motion contains little more than bare and self-contradictory allegations as to the harm that will be suffered by GTE/SNET. These claims of harm do not survive scrutiny and provide no basis for a stay. Moreover, the Motion glosses over the genuine harm that new entrants will suffer if a stay is granted. Analysis of the harm that will be suffered by competitors if a stay is granted, coupled with the failure of GTE/SNET to demonstrate irreparable harm, mandates denial of the Motion.

The Motion simply cannot demonstrate the irreparable harm that is required for the extraordinary grant of a stay pending appeal because (1) it is concerned only with monetary damages, which cannot properly be the subject of equitable relief and (2) the very Commission order it attacks contains the mechanism by which any such damage would be prevented. The Commission's order expressly invites incumbent local exchange carriers ("LECs") "to seek relief from the Commission's pricing methodology if they [can] provide specific information to show that the pricing methodology, as applied to them, will result in confiscatory costs."[2/] The LECs' interest is a mere economic one that does not entitle them to equitable relief -- if rates must be increased, as GTE/SNET argue, they can be made whole effectively by a retroactive increase in the rates they would be owed

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[2/] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325 (CC Docket 96-98, August 8, 1996) (the "Order") at ¶ 739.

by new entrants.[3/] As GTE/SNET concede, "agreements can be revised" to take into account the end result of the appeal of the rules.[4/] Little more need be said.

The Motion is internally inconsistent and unpersuasive as to the irreparable harm that GTE/SNET supposedly would suffer if a stay is not granted. First, the Motion states that the Commission's rules will have a stifling impact on negotiations and that negotiations will come to a halt if a stay is not granted. *See* Motion at 25-28. Then, the Motion contends that all of the agreements reached during the negotiation period will be locked in and not subject to renegotiations because those agreements will be irreversible commitments. *See id.* at 29-30. GTE/SNET cannot have it both ways. We think that the Commission's rules will, if permitted to become effective, produce agreements between the parties; indeed, that may be the ultimate concern of GTE/SNET. Second, GTE/SNET claim that they will have "lost forever the opportunity to conduct voluntary negotiations free from the influence of [Commission] rules" if the stay is not granted. Motion at 29. Since incumbent LECs, with their bottleneck control, always have the upper hand in these negotiations, it is hard to imagine how GTE/SNET will be irreparably damaged if, as they predict, the current negotiations based on the Commission's rules are rendered moot.

New entrants, in stark contrast, would be harmed by the grant of a stay.

First, the Motion devotes a scant two pages to its conclusory argument that the scores of new competitors awaiting the implementation of the Telecommunications Act of 1996 (the "Act") will not be harmed. The argument that delay will not harm new entrants

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[3/] *Id.* at ¶ 739; *see also* ¶ 707.

[4/] Motion at 37.

simply is not credible. A stay of the Commission's historic interconnection decision will freeze in place any progress on local competition that is being made by incumbent LECs, new providers, and states. The chilling effect of a stay will be welcomed by many incumbent LECs, which are likely to revert to their pre-Act conduct of simply stonewalling requests for fair and balanced interconnection agreements. New entrants would have their entry strategies stymied at a crucial moment. And a stay will reverberate through the financial and investor community, the support of which is crucial to the success of local competition.

If new entrants such as Sprint Spectrum cannot obtain interconnection and transport-and-termination contracts based on the fair and effective terms envisaged by the Act, their opportunity to offer the competitive new services that Congress intended the Act to encourage will be lost. Sprint Spectrum, in particular, is in the process of rolling out competitive PCS services to some 180 million Americans. If the rules are stayed, Sprint Spectrum will not have access to the network services it will need to offer the public a competitive wireless service. This once-in-a-lifetime opportunity to launch a service that can compete effectively in the telecommunications marketplace from the outset simply cannot be regained if the current monopoly market is perpetuated until judicial review of the rules is complete. In the dynamic telecommunications market, competition delayed truly is competition denied.

Second, GTE/SNET claim, remarkably, that incumbent LECs will continue to negotiate with new entrants even if the rules are stayed. This argument defies both history and common sense. Sprint Spectrum has sought to negotiate in good faith with LECs

across the country and, while the rulemaking was pending, had no success in entering into any agreement for reciprocal compensation for transport and termination of traffic. All bargaining in the interconnection context is done in the shadow of the law. If the substantive rules are stayed while under challenge and the law thus does not require fair interconnection, incumbent LECs will have no incentive to negotiate fairly with new entrants.[5/] Because LECs refused to negotiate with new competitors after the passage of the Act but before final rules were released, it is safe to assume that they will not negotiate fairly while they are challenging those rules in the courts -- unless this stay request is denied and the Order becomes effective.

In assessing the balance of the harms presented here, the Commission should credit the views of the new entrants that are uniquely positioned to inform the Commission both of their competitive needs and of the negotiating behavior of incumbent LECs. Any rational assessment of the significant harms that would befall new entrants upon a potentially years-long delay of competition balanced against the mere economic interests of incumbent LECs yields the inescapable conclusion that the rules must not be stayed.

[5/] As one commentator has summarized the economic conditions at issue here, "if there are no regulatory controls on compensation for interconnection, the monopolist of part of the market can extend its monopoly power to the entire market." G.W. Brock, *Interconnection and Mutual Compensation With Partial Competition* (CC Docket 94-54, 1995). Under current "compensation arrangements," LECs can impose inflated charges to terminate traffic on their bottleneck systems as a way of extracting monopoly rents and preventing new entrants from ever challenging the local exchange monopoly. *See* Comments of Sprint Spectrum L.P. and American PCS, L.P., CC Docket 94-54 (March 4, 1996).

II.

A STAY OF THE RULES WOULD PREVENT COMPETITION, FRUSTRATE THE GOALS OF CONGRESS AND DISSERVE THE PUBLIC INTEREST.

The Motion includes a makeweight argument claiming that the public interest would be served by a stay of the rules because of Congress' supposed goal of favoring "privately negotiated agreements" in passing the Act.[6/] We submit that GTE/SNET have missed the obvious and overriding goal of the Act: to open former monopoly markets to competition on terms that are fair to LECs and effective to promote competition by new entrants. If Congress intended "privately negotiated agreements" to be the dominant goal of federal law, it hardly would not have needed to pass the Act. The plain fact is that Congress recognized that "privately negotiated agreements" had limited utility in promoting competition and thus set out the procedures that were properly implemented by the Commission in the Order.

The public interest would be markedly disserved by staying the rules. Congress made it clear that it wished competition to be implemented on an expedited basis by its explicit requirement that the Commission complete this rulemaking proceeding by August 1996 -- a deadline for a complex proceeding that surely is among the most stringent ever imposed on the Commission by Congress. Without question, Congress did not intend the telecommunications competition it sought to encourage by the Act to be "put on hold" for months or even years as various appeals wind their way through the federal judiciary.

[6/] Motion at 39-41.

If a stay is granted, the American public will be the loser. The public today stands to gain an unprecedented diversity of service and price competition as new entrants are poised to enter the telecommunications market from coast to coast. Forestalling that competition will prevent these services from being offered on a competitive basis (and, in some cases, perhaps at all). Competition will promote lower prices and greater service; consumer prices will not fall if competition is stopped by the entry of a stay. The only parties that will benefit from a stay of the status quo are the entrenched entities that would benefit from a delay or demise of new competition. But the public interest, as measured by the actual interests of the public in highly demanded, competitive new services and the intent of its elected representatives in Congress, clearly favors moving ahead with competition rather than preserving the old-style marketplace.

III.

GTE/SNET ARE UNLIKELY TO SUCCEED ON THE MERITS.

The core of the Motion's argument on the merits is that the Commission erred in setting presumptive proxy price levels because those price levels do not reflect the "actual" costs levels experienced by GTE/SNET. This clearly is not the case. The Commission fastidiously analyzed the cost data that was submitted and crafted a presumptive range of proxy costs.[7/] What is more remarkable about this argument, however, is the fact that neither GTE nor SNET submitted during the course of this rulemaking proceeding the very cost data they now criticize the Commission for failing to consider. GTE and SNET cannot rationally claim the Commission erred in its assessment of cost data when GTE

[7/] *See, e.g.*, Order, ¶¶ 767-836.

and SNET themselves refused to submit cost data during the course of the rulemaking proceeding they now challenge. The result of this appeal will be a finding that the Commission properly analyzed the cost data before it and properly implemented the Act.

The Motion's supposed takings claim is even more frivolous. The issues at stake in this docket clearly raise no *per se* takings claim, as the Commission's rules do not authorize a permanent physical invasion of anyone's property, *compare Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Bell Atlantic Telephone Companies* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994); nor will any of the rules deprive anyone of "all economically beneficial or productive use" of property, *Lucas* v. *South Carolina Coastal Comm'n*, 112 S.Ct. 2886, 2893 (1992).[8/] Thus, the principles in the Commission's rules are not a taking of any property, but simply a regulatory measure that "adjust[s] the benefits and burdens of economic life to promote the common good." *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

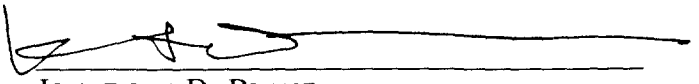
[8/] Because no party could make out a *per se* takings claim, the Takings Clause would not provide a basis to challenge the Commission's rules on a petition for review because there would not be "'an identifiable class or classes in which the application of the [rule] will necessarily constitute a taking.'" *See Bell Atlantic*, 24 F.3d at 1445 (*quoting* United States v. Riverside Bayview Homes, 474 U.S. 121, 128 n.5 (1985)).

CONCLUSION

The Commission should deny the stay requested by the Motion and permit the pro-competitive rules that resulted from its proper implementation of the Act to become effective.

Respectfully submitted,

SPRINT SPECTRUM L.P.
AMERICAN PCS, L.P.



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